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In the Supreme Court
of the United States
OCTOBER TERM, 1972

No.....

FRANCES W. TAYLOR, individually and as Executrix of the Will of Guy H. Winslow, deceased,

Petitioner,

v.

UNITED STATES OF AMERICA and MYRTLE L. JARVEY,

Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent Myrtle L. Jarvey prays that the petition for certiorari in the above-entitled case be denied.

OPINIONS BELOW

Omitted pursuant to Supreme Court Rule 40(3).

JURISDICTION

Omitted pursuant to Supreme Court Rule 40(3).

STATUTES AND REGULATIONS INVOLVED

Omitted pursuant to Supreme Court Rule 40(3).

QUESTION PRESENTED

Can a state court divorce decree affect an insured's right to designate the beneficiary of his life insurance under the National Service Life Insurance Act?

STATEMENT OF THE CASE

Respondent, Myrtle L. Jarvey, is not satisfied with the statement of the facts as prepared by Petitioner; therefore, the following statement of the facts and narrative is presented in supplement thereof:

The Arizona divorce decree between the now deceased insured and his beneficiary, the Respondent, Myrtle L. Jarvey, provided *inter alia* that:

> ". . . the plaintiff [beneficiary herein] be and she is hereby ordered and required to see that the day-to-day personal needs of the defendant [insured] are taken care of, including but not limited to seeing that the defendant is placed in an adequate nursing home. . . ."

The Petitioner-executrix herein, Frances W. Taylor, acting under a power of attorney for the insured, signed and approved the above decree. No mention was made therein respecting termination of the Respondent-beneficiary's status under the National Service Life Insurance policy in question. The record is devoid of any evidence manifesting the insured's intent to remove her as beneficiary.

ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

Certiorari should not be granted because the decision of the Ninth Circuit is correct and supported by an array of non-conflicting federal authority directly on point.

Petitioner contends that a conflict exists in decisions between the Ninth Circuit and the Fifth Circuit on the question which is at issue here. Respondent submits that no such conflict exists.

O'Brien v. *Elder*, 250 F.2d 275 (5th Cir. 1957), the Fifth Circuit case upon which Petitioner relies, is clearly distinguishable from the instant case in that it involved a property settlement agreement while the instant case does not. The *O'Brien* opinion is framed in terms of that property settlement agreement. Moreover, the language in that opinion is on its face much broader than that which is at issue here and was obviously given great weight by the divided court.

However, notwithstanding the distinguishable features of *O'Brien* v. *Elder*, *supra*, it cannot go unnoticed that that case stands alone against the great weight of authority and that the leading case among these, *Wissner* v. *Wissner*, 338 U.S. 655 (1950), was not even cited in *O'Brien* v. *Elder*, *supra*, even though it was decided seven years earlier.

In *Wissner*, *supra*, this Court declared that:

> ". . . Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." At page 658.

Other significant cases supporting the authority of *Wissner, supra,* and the decision of both the District Court and the Court of Appeals in the subject case include *Hoffman* v. *United States,* 391 F.2d 195 (9th Cir. 1968). There the Ninth Circuit held that the insured decedent had the right to change the beneficiary on his National Service Life Insurance policy notwithstanding a state divorce decree ordering the insured to maintain his former wife as the sole beneficiary. Similar holdings, awarding such proceeds in accordance with the beneficiary designation at the time of the insured's death and overriding state divorce decrees similar to the Winslows', may be found in *Heifner* v. *Soderstrom,* 134 F. Supp. 174 (N.D. Iowa 1955), *Kaske* v. *Rothert,* 133 F. Supp. 427 (S.D. Cal. 1955), *Eldin* v. *United States,* 157 F. Supp. 34 (S.D. Ill. 1957), *Fitzstephens* v. *United States,* 189 F. Supp. 919 (D. Wyo. 1960), *Kimball* v. *United States,* 304 F.2d 865 (C.A. 6, 1962) and *Suydam* v. *United States,* 404 F.2d 1329 (D.C. Cir. 1968).

However, even without the persuasive support of these cases, the plain language of the pertinent regulation, 38 C.F.R. § 8.47, makes clear that the insured can make an effective beneficiary change only ". . . by notice in writing signed by the insured and forwarded to the Veterans Administration. . . ." Moreover, 38 U.S.C. §§ 753 and 3101(a) by omission prohibit the beneficiary from assigning his (her) interest in such insurance to the insured.

CONCLUSION

Winslow did not make an effective beneficiary change in writing through the Veterans Administration and the statutes do not allow the beneficiary to assign her expectancy interest in the policy proceeds to the insured.

Therefore, it is respectfully prayed that the petition for writ of certiorari be denied.

Respectfully submitted,

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JOHN D. BURNS
Of Attorneys for Respondent